

STATEMENT OF NINA M. YOUNG
DIRECTOR, MARINE WILDLIFE CONSERVATION
THE OCEAN CONSERVANCY

Before the
Subcommittee on Fisheries, Wildlife, and Oceans
House of Representatives Committee on Resources
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On Behalf of

American Society for the Prevention of Cruelty to Animals, Cetacean Society International, Earth Island Institute, Defenders of Wildlife, Friends of the Sea Otter, Humane Society of the United States, International Fund for Animal Welfare, International Wildlife Coalition, National Environmental Trust, Natural Resources Defense Council, Polar Bears International, Sierra Club, The Fund For Animals, The Marine Mammal Center, Whale and Dolphin Conservation Society

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present our views on the Marine Mammal Protection Act and H.R. 4781. My name is Nina M. Young; I am the Director of Marine Wildlife Conservation for The Ocean Conservancy.

I. SUMMARY STATEMENT

The Ocean Conservancy (formerly the Center for Marine Conservation) played a leadership role in the development of the 1994 amendments to the Marine Mammal Protection Act (MMPA or Act), especially those governing the incidental take of marine mammals in commercial fisheries. The Ocean Conservancy believes that, in the sweeping changes made in 1994, Congress refined the Act and brought it closer toward achieving its goal of recovering marine mammal populations. The MMPA is an international model for effective conservation and protection of marine mammals. In our view, problems with the MMPA often stem not from the Act itself, but from the agencies' failure to implement the Act fully and effectively, compounded by a chronic lack of resources for effective implementation.

While we welcome H.R. 4781 and commend the Subcommittee for its work on this bill, we urge the Subcommittee to seize the opportunity to craft a truly visionary reauthorization bill that will tackle the emerging threats to marine mammal conservation. The problems facing marine mammals are becoming more complex and complicated. They encompass competition with commercial fisheries, habitat degradation associated with sound production and pollution, natural phenomena such as climatic regime shifts, and long-term chronic threats such as global climate change. The MMPA must evolve from merely looking at marine mammal stock structure and abundance to assessing marine mammal and ecosystem health. Tools that already exist in the MMPA such as Title IV—(Marine Mammal Health Stranding and Response) must be enhanced to establish a dedicated research program encompassing marine mammal health and the threats posed by contaminants and noise.

Any reauthorization bill must not only preserve, but also build on the gains that were made in 1994. In our view, an effective reauthorization bill will: prevent the weakening of the definition of harassment; safeguard the zero mortality rate goal; strengthen the MMPA penalty and enforcement provisions to deter violations of the MMPA effectively; improve the implementation of the take reduction team process; expand authority under Section 118 (16 U.S.C. § 1387) to allow the Secretary to authorize take reduction teams for fishery interactions involving prey related issues and other human-related threats (i.e. ship strikes); protect and strengthen the Act's co-management provisions to allow co-management of non-depleted species/stocks; increase the authorized appropriation levels for the Act overall, and specifically the health and stranding response provisions; and devise and implement a research plan to develop safe non-lethal deterrents to prevent marine mammals from interacting with fishers gear and catch. In written testimony submitted to the Subcommittee on April 6, 2000 and October 11, 2001 we offered amendment language to address these issues.

We understand that the Administration has a MMPA reauthorization bill pending at the Office of

Management and Budget. We look forward to reviewing and providing our comments on that bill to the Administration and the Subcommittee. We believe that encouraging all interest groups to engage in a multi-stakeholder process to develop a non-controversial and forward thinking reauthorization bill would provide the greatest benefit to the resource and the nation. We respectfully urge Congress to work with all affected parties towards this end.

In the meantime, the MMPA already has many of the tools it needs to protect marine mammals. Its implementation could be greatly improved if Congress would fund the statute at its authorized levels. Additionally, the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS) should work with the environmental and scientific communities and the fishing industry to undertake needed research and improve the MMPA's implementation.

Our comments are organized as follows: first, we provide our section-by-section comments on H.R. 4781 as well as additional language for these sections that would make the statute more effective. Next, we address the problems with the Department of Defense's proposed amendments to the definition of "harassment." Finally, we provide additional proposed amendments to ensure that the statute achieves its goal of marine mammal protection and conservation.

II. DETAILED COMMENTS ON H.R. 4781

SEC. 4. LIMITED AUTHORITY TO EXPORT NATIVE HANDICRAFTS

The Ocean Conservancy supports these provisions to clarify that Native handicrafts can be exported by a Native of Canada, Greenland, Russia, or by an Alaska Native as part of a cultural exchange. This resolves a problem created by the 1994 amendments, which allowed a Native of Canada, Greenland, or Russia to import marine mammal products into the United States as part of personal travel or a cultural exchange, but failed to address the export of those products at the end of the travel. Similarly the 1994 amendment introduced uncertainty regarding the export of Alaska Native handicrafts under similar circumstances.

SEC. 5. AUTHORIZATION OF APPROPRIATIONS

The Ocean Conservancy encourages the Subcommittee to further increase the authorized appropriation levels for both the Department of Commerce and the Department of Interior, to enhance implementation of the MMPA through improved marine mammal stock assessments and health-related research, increased staff resources to process scientific and small take permits, finalize regulations to implement take reduction plans within the timeframe stipulated in the Act and oversee the implementation of such plans, comply with the mandates of Title IV (Marine Mammal Health and Stranding Response Program), and increase observer coverage of Category I and II fisheries.

The Ocean Conservancy believes that the authorization level for the Department of Commerce to carry out the implementation of Sections 117 and 118 (16 U.S.C. §§ 1386-87) is woefully inadequate. For example, Section 117 calls for NMFS and FWS to produce stock assessment reports that include a description of the stock's geographic range, a minimum population estimate, current population trends, current and maximum net productivity rates, optimum sustainable population levels and allowable removal levels, and estimates of annual human-caused mortality and serious injury through interactions with commercial fisheries and subsistence hunters. The data in these reports are used to evaluate the progress of each fishery towards achieving its goal of zero mortality and serious injury. NMFS has defined a total of 145 cetacean and pinniped stocks in U.S. waters: 60 stocks in the Atlantic Ocean and Gulf of Mexico; 54 along the Pacific Coast of the continental United States and Hawaii; and 31 in Alaska and the North Pacific.

Accurate abundance estimates and stock identifications are essential to determine trends and population size relative to the optimum sustainable population level, and to calculate the potential biological removal (PBR)

level. These are also necessary to ensure that individual stocks are not subjected to intolerable levels of take. Abundance is estimated from counts conducted during aerial or shipboard surveys, and from photo-identification data combined with mark-recapture technology. The most obvious consequences of uncertainty regarding stock abundance or structure is that PBR levels, which are a direct function of stock abundance, are also uncertain and the tolerance of a marine mammal stock for human-caused mortality may be overestimated or underestimated if either its abundance is overestimated or its actual take level is underestimated. If PBR levels are overestimated, then the stock may be exposed to unknown and excessive levels of risk from human-caused mortality. If PBR levels are underestimated, then fishers and fisheries may be unduly restrained by unnecessary regulations. The risk of excessive take from a single stock can be exacerbated when multiple stocks are being managed but the characteristics of each stock (abundance, take levels) cannot be accurately determined. NMFS desperately needs to either undertake and/or update marine mammal stock assessments in the Gulf of Mexico, Atlantic and Pacific (around the Hawaiian Islands). Similarly FWS stock assessments for Alaskan marine mammal stocks under its jurisdiction (polar bear, walruses, and sea otters are also inadequate and outdated.

In addition, monitoring of commercial fisheries is sorely lacking, as are estimates of incidental take for these fisheries. The MMPA's management framework can only be effectively implemented if incidental take levels are measured accurately and precisely to determine if and when takes are occurring. A take reduction team can recommend effective measures that will reduce the number of takes only if incidental take levels can be reliably estimated. Therefore, reliable estimates of incidental take are fundamental to identifying the problem/interaction, devising mitigation measures, and obtaining feedback regarding the efficacy of those measures. Currently, observation or monitoring of some fisheries that interact with marine mammals is either absent altogether or insufficient to allow even minimal estimates of incidental take. A chronic problem for fisheries that are observed is that the data do not provide the precision needed to estimate incidental take levels with statistical confidence sufficient to detect a real change in the take rate. NMFS must be provided the funds to increase the level of observer coverage in fisheries that interact with marine mammals to derive statistically reliable estimates of incidental take.

NMFS must also continue to fund established take reduction teams until they achieve their goals under the MMPA. Additionally, NMFS should convene several other take reduction teams, including a reconstituted Atlantic Offshore Take Reduction Team. The table below, from NMFS' website, provides a breakdown of cost for the various stages of a take reduction team process. Based on this information, the agency is spending approximately \$5 million per year on take reduction teams. Most of the teams are in the monitoring and follow-up stage, with the exception of Bottlenose Dolphin Take Reduction Team, which just submitted its consensus plan in May. Therefore, we recommend that the Subcommittee increase the annual authorization for Sections 117 and 118 to \$35,000,000.

Generalized Take Reduction Process			
Stage	Element	Time	Cost (not including NMFS salaries)
Pre-team data collection	Abundance surveys	1-3 surveys	\$350K per survey
	Mortality estimates	3 years of observer coverage	\$850K per year per fishery
	Stock structure data	1-3 surveys	\$350 K per survey
	Fishery characteristics data		
	Contracting	2-2 ½ years	

Active TRT	Hiring facilitator	(if mortality is >PBR, teams have 6 months to submit plan to NMFS once team is convened)	\$500K (4-5 meetings)
	Assembling team		
	Meetings/travel costs		
TRP Development and Implementation	Proposed rule	6 months (legally is 60 days)	Staff resources
	Final rule	6 months (legally is 90 days including public comment period)	Staff resources
TRP Monitoring and TRT Follow-up	Mortality estimates	3-5 years of observer coverage	\$850K per year per fishery
	Reconvening teams	As necessary	\$100K per meeting

The Marine Mammal Health and Stranding Response Program under Title IV (16 U.S.C. §§ 1421-21(h)) should retain its own separate authorization provision within H.R. 4781, rather than be included in the base authorization. See 16 U.S.C. § 1421(g). Title IV is critical to the recovery and health of marine mammal populations. To date, the Marine Mammal Health and Stranding Response Program has greatly improved the response to routine strandings of marine mammals and unusual mortality events. Nevertheless, unexplained die-offs of marine mammals have continued on almost an annual basis along the United States coastline, and the wildlife agencies' response to these die-offs has been hampered by a lack of funding. Without adequate funding, the agencies cannot be proactive, develop a strong marine mammal health assessment program, support volunteer stranding networks, or develop accurate baseline information on stranding rates, contaminants, disease, and other factors related to detecting and determining causes of unusual mortality events. Furthermore, the lack of funds hinders these agencies' ability to fully develop and implement contingency programs to respond to die-offs or oil spills, and subsequently determine the cause of these die-offs that are potential indicators of the health of the marine environment. We recommend that the Subcommittee provide a separate \$5,000,000 annual authorization to NMFS for Title IV, a specific annual authorization of \$500,000 to the Marine Mammal Unusual Mortality Event Fund, and \$500,000 annually to the Secretary of Interior to carry out this Title.

SEC. 6. TAKE REDUCTION PLANS

We support the amendments to Section 118(f) and 118(j) of the MMPA in H.R. 4781. We believe that the amendments to Section 118(f) will significantly improve the take reduction team process and the plans that it develops. The amendment to Section 118(j) will provide NMFS with the ability to work cooperatively with various user groups to undertake the necessary measures to implement this Section effectively in the event there are insufficient federal funds to conduct research or observer programs.

The bill, however, is not sufficiently comprehensive in its approach to improving Section 118 (16 U.S.C. § 1387). Congress should seize this opportunity to refine this section to address problems that have arisen related to fishers obtaining the required authorization, placement of observers, increased observer coverage, the need for funding for observer coverage, and the inclusion of recreational fishing. The Ocean Conservancy offers the following suggestions.

Some non-commercial fisheries use gear similar or identical to commercial fishing gear and, as a result, are taking marine mammals at rates potentially equal to or greater than rates of incidental bycatch commercial fisheries. However, according to NMFS, there are currently no mechanisms to address this take within the MMPA's incidental take provisions. As a matter of equity, and for purposes of effective marine mammal conservation, non-commercial fisheries that employ gear similar to commercial fishing gear and that have

the same potential to take marine mammals should not be exempt from the Act. Therefore, The Ocean Conservancy supports amendments to include these fisheries under the provisions of Section 118. However, we are concerned that the amendment proposed in H.R. 4781 may not include all the references necessary to bring this subset of non-commercial fisheries under the authority of Section 118. We look forward to working with the Subcommittee revise the language in H.R. 4781 to achieve this objective.

Section 118(c): Registration and Authorization

The MMPA requires vessels engaging in Category I and II commercial fisheries to register with the Secretary to receive authorization to engage in the lawful incidental taking of marine mammals in that fishery. The MMPA provides the Secretary with the authority to place observers on commercial vessels engaging in Category I and II fisheries, and vessels that have received authorization to engage in these fisheries are obligated to take observers on board.

During several take reduction team negotiations, NMFS has remarked on instances where vessel owners have refused to allow observers on their vessels without adverse consequences. NMFS Enforcement has indicated that its efforts to enforce the Act are constrained because NOAA's Office of General Counsel has narrowly interpreted the term "engaged in a fishery" under Section 118(c)(3)(C) to mean engaged in the fishery on the day that a refusal to take an observer occurs. The MMPA should be amended to clarify the obligations of vessel owners in Category I and II fisheries to carry observers if so requested, and to provide NMFS with the explicit authority to punish violations of the observer requirements. The Act should also be amended to define the term "engaged in a fishery." (See Attachment at A-1 and A-2).

Congress should also strengthen the incentives for fishers to register under this section by allowing NMFS to seek forfeiture of the catch and to assess a substantial fine against the vessel for any fishing operations conducted in the absence of the required authorization. In addition, the fine currently stipulated in the Act for failure to display or carry evidence of an authorization is not a sufficient deterrent to noncompliance. (See Attachment at A-3).

Section 118(d): Monitoring Incidental Takes

Nearly every take reduction team recommends increased observer coverage. Funds for monitoring programs have been limited; generally, only fisheries experiencing frequent interactions with marine mammals have received priority for observer program coverage. Former NMFS Assistant Administrator Penny Dalton noted in her June 29, 1999, testimony before the House Resources Committee that: "Funds for monitoring programs have been limited; therefore, only fisheries experiencing frequent interactions with marine mammals have generally received priority for observer program coverage. In 1997, approximately 1/5 of the U.S. fisheries having frequent or occasional interactions with marine mammals were observed for these interactions. These large gaps in our knowledge of fisheries' impacts to marine mammal stocks makes it difficult to develop appropriate management measures." In most cases, shortfalls in program funding often result in diminished observer coverage. Consequently, The Ocean Conservancy strongly believes that the Secretary should have the discretion to assess fees, as needed, to initiate and implement an observer program, particularly for those fisheries that request such a program. (See Attachment at A-4).

NMFS has raised concerns regarding whether the agency has the authority to place observers on vessels in Category I and II fisheries that have not registered and obtained a marine mammal incidental take authorization. The Ocean Conservancy believes that the MMPA should be amended to clarify NMFS' authority to place observers on any vessel engaging in a Category I or II fishery, regardless of whether the owner or master of the vessel has registered. (See Attachment at A-5).

Repeal of Section 114

Given that Section 118 is fully functional, there is no longer any need for the interim exemption for commercial fisheries provided for in Section 114 (16 U.S.C. § 1383a). Therefore, Section 114 should be deleted and the necessary technical and conforming amendments made to other provisions in the Act.

SEC. 7. PINNIPED RESEARCH

Pinnipeds have never been the primary cause of a salmonid decline, nor has it been scientifically demonstrated that they have been a primary factor in the delayed recovery of a depressed salmonid species. Studies show that salmonids make up only a small percentage of pinniped diets, and that habitat loss is a primary factor in salmonid decline. Nonetheless, in 1994, the environmental community, the fishing industry, and Congress provided NMFS with the tools in Section 120 of the MMPA to address the issue of pinniped predation on threatened and endangered salmonid stocks.

Sections 109 and 120 (16 U.S.C. §§ 1379, 1389) offer effective and precautionary approaches to protecting pinnipeds, salmonid fishery stocks, biodiversity, and human health and welfare. Consequently, there is no need to amend the MMPA to allow a blanket authorization for the intentional lethal removal of pinnipeds by state and federal resource agencies. Nor do we believe that such a blanket authorization would be acceptable to the public.

Non-lethal deterrents hold the most promise to resolve the problems of “nuisance” animals and should be the first line of defense. NMFS has failed, however, to publish final guidelines on acceptable non-lethal deterrents. NMFS has also failed to give sufficient priority to dedicated research into the development of safe and effective non-lethal deterrents. Development of such deterrents will aid in reducing not only predation on threatened and endangered salmonid stocks, but also other conflicts between pinnipeds and humans.

The Ocean Conservancy supports H.R. 4781’s proposed amendment to provide for research into non-lethal removal and control of nuisance pinnipeds. We recommend, however, that this section of the bill be amended to: (1) require the Secretary to develop a research plan to guide research on the non-lethal removal and control of nuisance pinnipeds; (2) clarify that the development and testing of safe, non-lethal removal, deterrence and control methods shall provide for the humane taking of marine mammals by harassment, as defined by Section 3(18)(A)(ii) of the MMPA; (3) include other organizations and individuals--such as the conservation community--in addition to representatives of commercial and recreational fishing industries, in the development of the research program; (4) require the Secretary to make the annual report to Congress available to the public for review and comment; and (5) authorize the Secretary to accept contributions to carry out this section. (See Attachment at A-6).

SEC. 8. MARINE MAMMAL COMMISSION

The Ocean Conservancy opposes H.R. 4781’s proposed provision related to the Marine Mammal Commission striking the language in Section 206(5) (16 U.S.C. § 1406(5)) that states: “except that no fewer than 11 employees must be employed under paragraph (1) at any time.” Removing this lower threshold may provide some members of Congress with an incentive/rationale to decrease appropriations and, in turn, staff capacity on the Marine Mammal Commission. The Marine Mammal Commission plays a crucial role in the oversight and implementation of the Act and should be empowered to expand its authority to promote and undertake visionary dialogues and strategic thinking that will advance the purposes and policies of the Act. The Ocean Conservancy supports the authorization of appropriations proposed for the Marine Mammal Commission provided in H.R. 4781.

SEC. 9. SCRIMSHAW EXEMPTION

The Ocean Conservancy supports this provision, which extends the permits for individuals with pre-ESA ivory, to allow them to continue to possess, carve, and sell the ivory until 2007.

SEC. 10. EMERGENCY ASSISTANCE FOR SUBSISTENCE WHALE HUNTERS

The Ocean Conservancy supports this provision as a mechanism to ensure that whales that are struck in legal, authorized aboriginal hunts are landed and not lost.

SEC. 11. EXTENSION

The proposed provision in this section does not appear to correspond to the Section of the Act cited.

SEC. 12. POLAR BEAR PERMITS

In 1994, Congress provided for the issuance of permits authorizing the importation of trophies of sport-hunted polar bears taken in Canada, subject to certain findings and restrictions. The amendments required the public to be given notice prior to and after issuance or denial of such permits. H.R. 4781 proposes to change this public notification process to a semiannual summary of all such permits issued or denied. The Ocean Conservancy opposes this provision, as it would establish a blanket exemption to the notice and comment requirement and institute a dangerous precedent under which permits could be issued or denied without much-needed public scrutiny. The public comment process surrounding the issuance of a permit to import polar bear parts is needed to provide public oversight to verify that a permit is tied to tagging that clearly demonstrates when, and from what stock, the polar bear was taken. Rather than removing the public comment process, FWS should work to ensure that these provisions are effectively enforced and do not result in the illegal take or a negative change in the status of stocks that are currently depleted.

SEC. 13. CAPTIVE RELEASE PROHIBITION

Section 13 amends section 102 of the Act to clarify that the MMPA expressly prohibits any person subject to the United States' jurisdiction from releasing a captive marine mammal unless specifically authorized to do so under sections 104(c)(3)(A), 104(c)(4)(A), or 109(h). The Ocean Conservancy supports H.R. 4781's proposed provisions prohibiting the release of any captive marine mammal unless authorization has been received. We are sensitive to the potential harm that might result, in the absence of mandatory precautionary measures established as conditions of a captive release permit, to the animals released and to wild populations they encounter, through disease transmission, inappropriate genetic exchanges, and disruption of critical behavior patterns and social structures in wild populations. However, Section 13(3)(6) appears to set a different jurisdictional standard for the release of captive marine mammals than for other activities subject to the permit requirement of the MMPA. We believe this provision should be applied in the same manner as all other prohibitions under the Act. (See Attachment at A-7).

SEC. 14. MARINE MAMMAL COMMISSION ADMINISTRATION

We support this provision. The per diem rate in the Act is too low. Consequently, this provision precludes the Marine Mammal Commission from securing the services of most experts and consultants. By removing this restriction, the Marine Mammal Commission will be brought under the government-wide restrictions for the payment of experts and consultants.

III. PROPOSED MODIFICATIONS TO THE DEFINITION OF HARASSMENT

The Department of Defense has proposed a bill containing a provision that would amend the MMPA's definition of harassment. This amendment, similar to one advanced by the Clinton Administration in its MMPA Reauthorization Bill, which was also opposed by the environmental community and was never pursued by the previous Administration, would severely undermine the precautionary nature of the Act, and significantly raise the threshold that triggers a party's obligation to secure authorization to conduct activities that have the potential to harass marine mammals. The proposed definition would not only increase injuries and deaths of marine mammals, but also diminish transparency, result in a loss of scientific research and mitigation measures, require the agency or the party requesting the authorization to make difficult, if not impossible, scientific judgments about whether a given activity is subject to the Act's permitting and mitigation requirements, and impair enforcement of the Act.

Background

Congress sought to achieve broad protection for marine mammals by establishing a moratorium on their importation and “take.” Take is defined by statute as any act “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal.” See 16 U.S.C. § 1362(13). The MMPA allows the relevant Secretary to grant exceptions to the take prohibitions, by issuing either a “small take permit” or “incidental harassment authorization” if the best available scientific evidence reveals that such take would not disadvantage a specific marine mammal population.

Specifically, Section 101(a)(5)(A), 16 U.S.C. § 1371(a)(5)(A), of the MMPA authorizes the Secretary to permit the taking of small numbers of marine mammals incidental to activities other than commercial fishing (covered by other provisions of the Act) when, after notice and opportunity for public comment, the responsible regulatory agency (NMFS or FWS) determines that the taking would have negligible effects on the affected species or population, and promulgates regulations setting forth permissible methods of taking and requirements for monitoring and reporting. It generally takes the agency 240 days or more to promulgate regulations. In addition, Section 101(a)(5)(D), 16 U.S.C. § 1371(a)(5)(D), provides a more streamlined mechanism for obtaining small take authorizations when the taking will be by incidental harassment only. Under this provision, the Secretary is required to publish in the Federal Register a proposed harassment authorization within 45 days after receipt of an application. Following a 30-day public comment period, the Secretary has 45 days to issue or deny the requested authorization.

Definition of Harassment—The 1994 Amendment

In 1994, Congress amended the MMPA to differentiate between two types of harassment -- Level A and Level B. The definitions are as follows:

- (A) The term “harassment” means any act of pursuit, torment, or annoyance which –
 - (i) has the potential to injure a marine mammal or marine mammal stock in the wild; or
 - (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.
- (B) The term “Level A harassment” means harassment described in subparagraph (A)(i).
- (C) The term “Level B harassment” means harassment described in subparagraph (A)(ii).

16 U.S.C. § 1362(18).

The Department of Defense’s Proposed Definition

The Department of Defense claims that the definitions of Level A and Level B harassment added to the MMPA in 1994 are overly broad and somewhat ambiguous. In an attempt to resolve this perceived problem, and to circumvent its obligations under Section 7 of the Endangered Species Act and the preparation of environmental impact statements under the National Environmental Policy Act, the Department of Defense has proposed the following definition:

For purposes of chapter 31 of title 16 of the United States Code, harassment from military readiness activities occurs only when those activities:

- (1) injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; or
- (2) disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavior patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behavioral patterns are abandoned or significantly altered; or

(3) is directed toward a specific individual, group, or stock of marine mammals in the wild that is likely to disturb the specific individual, group, or stock of marine mammals by disrupting behavior, including, but not limited to migration, surfacing, nursing, breeding, feeding or sheltering.

Problems with the Proposed Definition

For Level A harassment, the proposed definition shifts from “has the potential to injure” to “injures or has the significant potential to injure.” For Level B harassment, “potential to disturb” becomes “disturbs or is likely to disturb”; and an addition is made to the language related to behavioral disruptions, requiring that natural behaviors be “abandoned or significantly altered” to meet the threshold of concern.

Its effect will be that more marine mammals will be adversely affected by military activities. Many activities, which were once permitted, monitored, and mitigated under the Act, would no longer require a permit. Consequently, these activities will have a greater likelihood of causing marine mammals to abandon nursing, feeding, and breeding activities. Moreover, adding the term “significant” does not create a more scientifically based definition. NMFS has struggled with the term “significant” and has yet to define it with regard to the “significant adverse impact” clause within the incidental take provisions for commercial fishing. Currently, the state of marine mammal science will not yield a clear definition of “significant potential” or of “significantly altered;” instead, it is likely to generate more scientific questions than answers.

Similarly, what constitutes “abandonment” will vary according to species, gender, time scale, and behavior: any abandonment of a nursing bout between an endangered right whale mother and calf is likely to have more serious implications than the temporary abandonment of a swimming path by a gray whale. The result of the Defense Department’s proposed amendment is likely to be less protection of marine mammals, less transparency, less mitigation and monitoring of impacts, and even more controversy and debate.

The Ocean Conservancy does not believe that the current definition of harassment is either overly broad or ambiguous. The term “potential” is clear and requires no further evaluation of the significance of an activity’s impacts or the likelihood of injury or disturbance. It is protective of the species, requiring only the disruption of behavioral patterns such as migration, breathing, nursing, breeding, feeding, or sheltering—impacts that are reasonably verifiable—rather than significant alteration of these behaviors, to trigger the Act’s prohibitions.

In addition, small take permit and incidental harassment authorization mitigation measures and monitoring requirements have been effective in protecting marine mammal populations while gathering critical information on the impacts of a particular activity on marine mammals. In many cases, these benefits would be lost under the proposed definition. It would raise the regulatory threshold and create ambiguity to such a degree that many activities could simply evade the requirement to obtain an authorization for species take.

We are sensitive to the issue of military readiness. We do not believe, however, that the Department of Defense has demonstrated that these changes are necessary or even that it has exhausted all possible procedural remedies. Given the significant risks of changing the harassment definition, The Ocean Conservancy and other interest groups should be given the opportunity to work constructively with the committees of jurisdiction to address the concerns of all parties. Adopting a significantly flawed change in the harassment definition in the Defense Authorization Bill would not only be disastrous for marine mammals, but also set a double standard that exempts the military from MMPA requirements that all other federal, state, and private actors must follow. If enacted, this amendment would severely diminish any chance of constructive dialogue on other conservation issues. We strongly recommend that Congress refrain from amending one of the most important provisions of the MMPA through another statute, and only address this issue as part of an overall MMPA reauthorization package, within the House and Senate committees of jurisdiction, after significant discussions with other federal agencies, scientists, and conservation groups.

IV. OTHER PROPOSED AMENDMENTS

Penalties and Cargo Forfeitures

The Ocean Conservancy believes that Section 105, the civil and criminal penalty provisions of the Act (16 U.S.C. § 1375), should be updated to reflect current economic realities. The existing penalty schedule, enacted thirty years ago and unchanged since enactment, sets penalties that are low enough to be viewed by some violators as an acceptable cost of doing business, thus undermining effective enforcement. Congress should amend Section 105 of the Act to authorize the Secretary to impose a civil penalty of up to \$50,000 for each violation, and a fine of up to \$100,000 for each criminal violation. (See Attachment at A-8 and A-9).

The Ocean Conservancy also believes that NMFS should be authorized to retain any fines that have been collected for violations of the MMPA to be used in the administration of its activities for the protection and conservation of marine mammals under its jurisdiction. Therefore, we propose that Congress add a provision to the Act to parallel 16 U.S.C. § 1375a, which authorizes FWS to use collected fines for its marine mammal conservation activities. (See Attachment at A-10)

Additionally, with respect to Section 106 (16 U.S.C. § 1376), to increase compliance with the MMPA by ensuring that penalties will deter future violations of the statute, we propose an amendment to authorize the Secretary to impose a civil penalty of up to \$50,000 against vessels used to take marine mammals and vessels that fish in violation of the provisions of section 118 of the Act. Finally, section 106 should be amended to allow for the seizure and forfeiture of a vessel's cargo for fishing in violation of the provisions of section 118. (See Attachment at A-11)

Interference with Investigations and Observers

The MMPA currently contains no specific prohibition against activities that undermine the effective implementation and enforcement of the Act. Individuals who refuse to permit boardings, who interfere with inspections or observers, or who intentionally submit false information may not be subject to prosecution under the MMPA, as such activities are not specifically prohibited. To address this long-standing deficiency within the MMPA, we recommend changes to the statute patterned on similar provisions currently found in the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1857). (See Attachment at A-12)

Title IV-- Marine Mammal Health And Stranding Response

Use of the Emergency Response Fund

In 1994, Title IV, Marine Mammal Health and Stranding Response, was amended to allow funds from the Unusual Mortality Event Fund to be used for the care and maintenance of marine mammals seized under section 104(c)(2)(D) (16 U.S.C. § 1374(c)(2)(D)). The Marine Mammal Unusual Mortality Event Working Group opposes the use of these funds for this purpose, as does The Ocean Conservancy. This situation could rapidly deplete funds that are needed to respond to unusual mortality events. The need for funds to provide for the care and maintenance of seized marine mammals should be addressed in either the Animal Welfare Act or in another provision of the MMPA. Furthermore, potential contributors to the fund might be deterred by this provision due to the controversy surrounding marine mammals in captivity. The Ocean Conservancy recommends that this provision in Section 405(b)(1)(A)(iii), 16 U.S.C. § 1421d (b)(1)(A)(iii), be deleted. (See Attachment at A-13).

Improve Response to Marine Mammal Entanglements

Each year, an ever-greater number of marine mammals becomes entangled in fishing gear and other marine debris. It is important that NMFS and FWS have the explicit authority to collect information on these entanglements. Disentanglement has proven an effective mitigation measure for humpback whales,

northern fur seals, California sea lions, and Hawaiian monk seals, and has proven to be significant to the survival of the North Atlantic right whale. These efforts promote the conservation and recovery of these species and should continue as a matter of priority. To improve efforts to monitor and respond to entanglement threats to marine mammals, The Ocean Conservancy proposes that Title IV, 16 U.S.C. §§ 1421-1421h, be amended as outlined in the attachment. (See Attachment at A-14 through A-18).

Deterrence Of Marine Mammals

Although Section 104(a)(4)(B) (16 U.S.C. § 1371(a)(4)(B)) requires the Secretary to publish a list of guidelines for safely deterring marine mammals the Secretary has failed, to date, to comply with this provision. Both The Ocean Conservancy and the fishing industry continue to be extremely frustrated by the lack of statutorily-required guidelines for non-lethal deterrents. Moreover, because NMFS cannot enforce guidelines, The Ocean Conservancy recommends that the statute be amended to require NMFS to promulgate regulations that delineate acceptable methods of safely deterring marine mammals, including threatened and endangered marine mammals. Our proposed amendment establishes that the Secretary's regulations on the use of non-lethal deterrence methods shall be mandatory, with penalties prescribed for using non-approved methods. The proposed amendment also establishes a process whereby parties may petition to have additional methods of non-lethal deterrence reviewed and approved by the Secretary. The burden of proof to demonstrate that the proposed non-lethal deterrence method is safe and effective shall be on the proponent of the method. (See Attachment at A-19).

Cumulative Takes

The Ocean Conservancy is concerned that applicants may be using the streamlined mechanism for authorizing incidental takes by harassment for a period of up to one year to avoid the assessment of the cumulative impacts of such activities over time. Applicants may segment long-term activities into one-year intervals, seeking a separate authorization for each, or may seek separate authorizations for each of several similar or related activities. By themselves, these activities may have only negligible impacts, but may be of significant detriment when viewed cumulatively. Therefore, we recommend that Section 101(a)(5)(D)(i) be amended to ensure authorized activities have a negligible impact, taking into account cumulative impacts of related activities in the authorized period as well as in subsequent years. (See Attachment A-20).

Subsistence Hunting of Marine Mammals

Subsistence hunting and management of strategic stocks

The management history of the subsistence harvest of beluga whales in Cook Inlet illustrates the need for proactive federal intervention and management to avoid a marine mammal species becoming eligible for listing as depleted under the MMPA. The purpose of the definition of "strategic" marine mammal stocks in Section 3(19), 16 U.S.C. § 1362(19), is to identify unsustainable levels of take so that appropriate action can be taken to avoid listing that stock as depleted under the MMPA or as threatened or endangered under the ESA. While The Ocean Conservancy does not oppose subsistence use, we believe that, in those cases where marine mammal stocks are designated as strategic, the federal government should be given the discretion to intervene and work with Native communities to monitor and regulate harvests to ensure the long-term health of the stock and sustainable subsistence harvests. Therefore, we propose that Section 101(b), 16 U.S.C. § 1371(b), be amended to allow the Secretary to prescribe regulations governing the taking of members of a strategic stock by Native communities. (See Attachment A-21).

Co-management of strategic and depleted stocks

While The Ocean Conservancy does not oppose subsistence hunting when conducted in a sustainable manner, we believe that future co-management agreements should generally be limited to stocks that are not strategic or depleted. We are concerned that there is inadequate infrastructure within the Native communities to support co-management of strategic or depleted stocks. We generally support co-management of all non-strategic stocks, as long as the co-management agreement considers the entire range of the stock, includes all Alaskan Natives that engage in subsistence use of that particular marine mammal

stock, and contains provisions for monitoring and enforcement. We believe that the agencies and Alaskan Natives involved in drafting a co-management agreement should consult with the conservation community during the drafting process, to ensure transparency of that process. Before a co-management agreement is finalized, or final implementing rules or regulations are published, the public must be afforded an opportunity for notice and comment. A co-management agreement should provide for revocation of the agreement, tie violations of the agreement to the penalty provisions of the Act, establish emergency regulations in the event that mortality and serious injury of a marine mammal stock is having or is likely to have a significant adverse impact on the stock, and provide grants for research, monitoring, and enforcement of the agreement. (See Attachment at A-22).

V. SOUTHERN SEA OTTERS

The FWS efforts to recover the southern sea otter (*Enhydra lutris nereis*), found mainly off the central California coast and listed as threatened under the federal Endangered Species Act (ESA), have not been successful. The southern sea otter population steadily increased between the mid-1980s and 1995, but since 1995, the population has declined by 9 %. The current population is over 2,100 individuals, a drastic decline from an estimated historical population of 16,000-20,000 animals. The greatest extant threats to the subspecies include oil spills, infectious disease, water pollution, and fishing gear and nets.

In accordance with the Translocation Law (Public Law 99-625 (1986)), in 1986, FWS began an experiment to move (translocate) a number of southern sea otters to San Nicolas Island off of Santa Barbara -- south of their current range--in an attempt to create a viable second colony. The goal was to minimize the chance that the entire subspecies could be wiped out by an oil spill along the central California coast. FWS estimates that the translocated colony on San Nicolas Island currently numbers less than 25 sea otters. The Translocation Law also created an otter-free zone to protect shellfish fisheries from sea otter competition, as these areas were devoid of otters at the time of the law's passage. Despite their declining population, a group of predominantly, male sea otters have seasonally expanded their geographical range into this otter-free zone. Moreover, new information on sea otters discovered since the Translocation Law's enactment demonstrate that its statutory provisions are no longer in the southern sea otter's best interests.

In 2000, FWS found in a biological opinion that the removal of sea otters from the Southern California "otter free management zone" would jeopardize their "continued existence" and that allowing the southern sea otter to expand its range is "essential to the species' survival and recovery." Furthermore, FWS has completed a Draft Evaluation of the Southern Sea Otter Translocation Program, in which the agency proposes to designate the translocation a failure, and has initiated development of a Supplemental Environmental Impact Statement (SEIS) to reevaluate the translocation program. Given the decline in the southern sea otter population, The Ocean Conservancy concurs with the biological opinion and believes that moving any animals out of the management zone would likely result in mortality that would further impede recovery, in violation of the ESA.

Preventing further range expansion will limit the natural growth rate of the mainland population. Access to historical habitat may halt the population decline, prevent nonspecific resource competition, and decrease the potential for disease by providing more space. Therefore, The Ocean Conservancy supports declaring the translocation a failure, eliminating the management zone, allowing the existing population at San Nicolas Island to remain, and allowing sea otters to naturally expand their range.

In the past, The Ocean Conservancy and Friends of the Sea Otter have engaged in discussions with the fishing industry about how to recover the southern sea otter while working to ensure the sustainability of commercial shellfish fisheries. Several conservation organizations would be interested in resuming this dialogue with the fishing industry to continue to explore potential areas of common ground that we have identified that, utilizing the existing statutory and regulatory framework would promote both the recovery of the southern sea otter and healthy fisheries. In the meantime, we urge Congress to refrain from amending the MMPA, and to direct FWS to expeditiously complete its reevaluation of the translocation. We also request that Congress provide funds to undertake activities that the environmental community and the

fishing industry have identified as beneficial to the sea otter recovery and fisheries.

VI. CONCLUSION

The Ocean Conservancy believes that the MMPA has made significant progress in conserving marine mammals and that the statute is at a unique stage in its evolution. With no pressing deadlines or urgent problems to address with respect to the MMPA, Congress the opportunity to craft narrowly focused amendments to improve the implementation and enforcement of the current Act, as well as to adopt new provisions that will begin to address the emerging threats to marine mammals. We urge the Subcommittee to work with all interest groups and agencies to draft a progressive reauthorization bill. We look forward to participating in this effort.

ATTACHMENT A

SEC. 6. TAKE REDUCTION PLANS

Section 118(c): Registration and Authorization

A-1: At Section 118(c)(3)(C) amend paragraph (C) to add clause (iv) as follows:

“(iv) fails to take an observer when requested to do so by the Secretary.”

At the end of Section 118(c)(3)(C), delete “clauses (i) and (ii)” and insert “clauses (i), (ii), and (iv).”

A-2: At Section 3 of the Act, insert a new definition (28) as follows:

“(28) The term “engaged in a fishery” means to have a valid permit issued by the Secretary in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. § 1801 et seq.) or the State for any of the fisheries listed under Section 118(c)(1)(A)(i), (ii), or (iii).”

A-3: At Section 118(c)(3)(C) insert after the phrase “clauses (i), (ii), and (iv)...” the phrase: “shall be subject to the penalties, fines and forfeiture under Sections 105 and 106 of this title, and for violations of clause (iii) shall be subject to a fine of not more than [\$100.00] \$5,000.00 for each offense.”

Section 118(d): Monitoring Incidental Takes

A-4: At Section 118(d) insert a new paragraph (11) as follows:

“(11) The Secretary may establish a system of fees to pay for the costs of implementing an observer program established under this section.”

A-5: At Section 118(d) insert a new paragraph (8) as follows and renumber paragraphs 8 and 9 as 9 and 10:

“(8) The Secretary may require that an observer be stationed on a vessel engaged in a fishery listed under subsection (c)(1)(A)(i) or (ii) which is not registered under subsection (c).”

SEC. 7. PINNIPED RESEARCH

A-6: Amend Section 120 by adding at the end the following:

“(k) RESEARCH ON NONLETHAL REMOVAL AND CONTROL.—(1) The Secretary shall develop a research plan and conduct research on the nonlethal removal, deterrence, and control of nuisance pinnipeds. The research plan shall include a review of measures that have been taken to effect such removal, the effectiveness of these measures, and shall propose research to test new technologies to deter nuisance pinnipeds and their impacts on the ecosystem. The development and testing of safe, non-lethal removal, deterrence and control methods shall provide for the humane take of marine mammals by harassment, as defined at Section 3(18)(A)(ii) of this Act.

(2) The Secretary shall include, among the individuals that develop the research program under this subsection, the Marine Mammal Commission, representatives of academic and scientific organizations, environmental groups, commercial and recreational fisheries groups, gear

technologists, and others as the Secretary deems appropriate.

(3) The Secretary is encouraged, where appropriate, to use independent marine mammal research institutions in developing and in conducting the research program.

(4) The Secretary shall, by December 31 of each year, submit an annual report on the results of research under this subsection to the Committee on Resources of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.”

(5) The Secretary shall make the report and the recommendations submitted under paragraph (4) available to the public for review and comment for a period of 90 days.

(6) For the purposes of carrying out this section, the Secretary may accept, solicit, receive, hold, administer, and use gifts, devices, in-kind contributions, and bequests.

(7) There are authorized to be appropriated to the Secretary \$1,500,000 annually to carry out the provisions of this subsection.”

SEC. 13. CAPTIVE RELEASE PROHIBITION

A-7: Modify new paragraph (6) in Section 102(a) of the Act by inserting after the word “marine mammal” the phrase “on the high seas, or for any person to release any captive marine mammal in waters or on lands under the jurisdiction of the United States.”

IV. OTHER AMENDMENTS

Penalties and Cargo Forfeitures

A-8: Modify Section 105(a)(1) to read as follows:

“(a)(1) Any person who violates any provision of this title or of any permit or regulation issued thereunder, may be assessed a civil penalty by the Secretary of not more than [10,000] \$50,000 for each such violation, except as provided in Section 118. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Each unlawful taking, importation, exportation, sale, purchase or transport and each day on which unlawful fishing is conducted in violation of section 118 (c)(3)(C) shall be a separate offense. Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown. Upon any failure to pay a penalty assessed under this subsection, the Secretary may request the Attorney General to institute a civil action in a district court of the United States for any district in which such person is found, resides, or transacts business to collect the penalty and such court shall have jurisdiction to hear and decide any such action.”; and

A-9: Modify Section 105 (b) to allow a criminal fine: “not more than [\$20,000] \$100,000 for each such violation”

A-10: Amendment to 16 U.S.C. § 1375a:

Insert “of the Interior” after “Secretary” and renumber as subsection (a);

Insert subsection (b) as follows:

“Hereafter, all fines collected by the National Marine Fisheries Service for violations of the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq., and implementing regulations shall be available to the Secretary of Commerce, without further appropriation, to be used for the expenses of the National Marine Fisheries Service in administering activities for the protection and recovery of marine mammals under the Secretary of Commerce’s jurisdiction, and shall remain available until expended.”

A-11: Amend Section 106(b) s follows:

(a) by adding in subsection (a) the phrase “or in fishing in violation of section 118(c)(3)(A)(i), (iii), or (iv)” after “that is employed in any manner in the unlawful taking of any marine mammal”;

(b) by adding in subsection (a) the phrase “or unlawful fishing” after “in connection with the unlawful

taking of a marine mammal”;

(c) by adding in subsection (b) the phrase “or in fishing in violation of section 118(c)(3)(A)(i), (iii), or (iv)” after “that is employed in any manner in the unlawful taking of any marine mammal”;

and

(d) by striking in subsection (b) “\$25,000” and inserting “\$50,000”

Interference with Investigations and Observers

A-12: Amend Section 102 (16 U.S.C. § 1372) as follows:

(a) redesignating subsection (d), (e), and (f) as (e), (f), and (g) respectively; and

(b) adding a new subsection (d) to read as follows: “(d) Obstruction of Investigations. – It is unlawful for any person to–

(1) refuse to allow any person authorized by the Secretary to enforce this title to board any vessel or other conveyance for purposes of conducting any search or inspection in connection with enforcement of this title;

(2) assault, resist, oppose, impede, intimidate or interfere with any person authorized by the Secretary to enforce this title, who is conducting any search or inspection in connection with enforcement of this title;

(3) resist a lawful arrest for any act prohibited under this title;

(4) interfere with, delay, or prevent, by any means, the apprehension or arrest of any person, knowing such person has committed any act prohibited by this title;

(5) knowingly and willfully submit false information to any person authorized by the Secretary to implement or enforce the provisions of this title, or

(6) to assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with, or attempt to assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with, any observer on a vessel under this Act, or any data collector employed by the Secretary or under any contract to any person to carry out responsibilities under this Act.”

Use of the Emergency Response Fund

A-13 Delete Section 405 (b)(1)(A)(iii).

Improve Response to Marine Mammal Entanglements

A-14: Section 402(b)(1)(A) (16 U.S.C. § 1421a(b)(1)(A)) is amended by inserting the words “or entangled” after the word “stranded”.

A-15: Section 402(b)(3) (16 U.S.C. § 1421a(b)(3)) is amended by inserting the words “or entanglements” after “strandings” and by inserting the words “or entangled” after “stranded”.

A-16: Section 403 (16 U.S.C. § 1421b) is amended by revising the title of the section to read “Stranding or Entanglement Response Agreements” and in subsection (a) by inserting at the end of the sentence “or entanglement.”.

A-17: Section 406 (16 U.S.C. § 1421e) is amended in subsection (a) by inserting the words “or entanglement” after “stranding”.

A-18: Section 409 (16 U.S.C. § 1421h) is amended by adding at the end a new subparagraph as follows: “(7) The term ‘entanglement’ means an event in the wild in which a living or dead marine mammal has gear, rope, line, net, or other material wrapped around or attached to it and is–

(1) on a beach or shore of the United States; or

(2) in waters under the jurisdiction of the United States (including any navigable waters).”.

Deterrence of Marine Mammals

A-19: Amendments to Section 101(a)(4), 16 U.S.C. § 1371(a)(4):

In first sentence of subparagraph (B), strike “a list of guidelines for use in” and insert “final regulations to implement this paragraph. Such regulations shall include permissible measures for.” Strike “safely deterring” and insert “the safe and nonlethal deterrence of”. In second sentence of subparagraph (B), strike “the Secretary shall recommend” and insert “the final regulations shall prescribe.” Strike “which may be used to nonlethally deter” and insert “specific nonlethal measures that may be used to deter such”. Strike third sentence of subparagraph (B).

Strike existing subparagraph (C), and insert new subparagraph (C) as follows:

After the effective date of the final regulations referenced in subparagraph (B), it shall be a violation of this chapter for any person to use a measure to deter marine mammals pursuant to subparagraph (A) that is not listed in such regulations. Violations shall be subject to the penalties prescribed in Sections 105 and 106.

Insert new subparagraph (D) as follows, and renumber existing subparagraph (D) as subparagraph (E):

Any person may petition the Secretary pursuant to 5 U.S.C. § 552 to add a non-lethal marine mammal deterrence measure to those listed in the final regulations referenced in subparagraph (B). The burden of proof shall be on the petitioner to demonstrate that the petitioned measure is safe and effective. If the Secretary finds, based on the best available scientific information, and after notice and opportunity for public comment, that the petitioned measure is a safe and effective means of non-lethal deterrence of marine mammals, he shall amend the final regulations referenced in subparagraph (B) to add such measure to the list of permissible measures and shall promptly publish notice of his action in the Federal Register.

Cumulative Takes.

A-20: Insert a new 101(a)(5)(D)(i)(I) as follows:

“(I) Will have a negligible impact on such species or stock, with consideration given to all related activities, including all activities that may occur beyond the 1 year authorization period, that may cumulatively result in more than a negligible impact.”

Subsistence Hunting and Management of Strategic Stocks

A-21: In the last paragraph of Section 101(b), insert the phrase “or strategic” after the word “depleted”.

Co-management of Strategic and Depleted Stocks

A-22: Strike subsection (a) of Section 119 and all that follows and insert the following:

“(a) IN GENERAL. – The Secretary may enter into co-management agreements with Alaska Native Organizations to conserve and manage - species or stocks of marine mammals through the regulation of subsistence use by Alaska Natives. Any agreement not in existence as of the effective date of this Act shall not apply to species or stocks designated as strategic or depleted under this Act, or to species or stocks listed as threatened or endangered pursuant to the Endangered Species Act. Agreements in existence as of the effective date of this Act that otherwise satisfy the requirements of this Section may be renewed.

(b) MANAGEMENT PLAN REQUIRED.--Agreements shall include, at a minimum, a management plan that –

- (1) identifies the signatories to, and the stock or species and areas covered by the plan; provided that each Alaska Native Organization that engages in subsistence use of the affected stock or species within the area covered by the plan is a signatory to the agreement;
- (2) is based on biological information and traditional ecological knowledge;
- (3) provides that any harvest of a stock or species covered by the plan be sustainable and designed to prevent such populations from becoming depleted or strategic;
- (4) has a clearly defined process and authority for enforcement and implementation of any

management prescriptions; and

(5) specifies the duration of the agreement and sets forth procedures for periodic review and termination of the agreement.

(c) **PROCEDURAL REQUIREMENTS.**—In formulating and implementing agreements under this section, Alaska Native Tribes and Tribally Authorized Organizations shall comply with provisions of 25 U.S.C. § 1302; except that the penalties set forth in section 105 of this Act (16 U.S.C. § 1375) shall be applicable to violations of Tribal regulations or ordinance promulgated to enforce agreements entered into under this section.

(d) **VIOLATION.**—The breach of any provisions of a cooperative or co-management agreement shall be deemed a violation of this title and shall be subject to penalties under this Act. Any vessel used in such violation shall be subject to the forfeiture provisions of Section 106 of this Act.

(e) **PROHIBITION.**—It is unlawful for any person within the geographic area to which a co-management agreement adopted pursuant to this section applies, to take, transport, sell, or possess a marine mammal in violation of any regulation or ordinance adopted by an Alaska Native Tribe or Tribally Authorized Organization that is a signatory to the agreement for that stock or for a specific portion of the geographic range of that stock or species.

(f) **REVIEW AND REVOCATION OF MANAGEMENT PLANS--**

(1) The Secretary shall conduct a review of the management plan every three years or at least annually for a stock for which significant new information is available.

(2) The Secretary may revoke the management plan if the actions of the Alaska Native Organizations that are parties to the plan are not in accordance with the terms of the co-management agreement or the requirements of this Act; provided that the Secretary shall give such Alaska Native Organizations an opportunity to correct any deficiencies identified by the Secretary within 60 days from the date of receiving notice of such deficiencies from the Secretary.

(g) **PUBLIC NOTICE AND REVIEW.**—The Secretary shall, prior to approval and signature of a co-management agreement under this section provide public notice and an opportunity for public review and comment on the draft agreement. Furthermore, the Secretary shall, prior to publication of final regulations implementing any such co-management agreement, provide public notice and an opportunity to comment on the draft regulations.

(h) **EFFECT OF DESIGNATION OF A STOCK AS DEplete OR STRATEGIC.**—In the event the Secretary determines that a species or stock subject to a co-management agreement is strategic or depleted, the Secretary may prescribe regulations pursuant to Section 101(b) of this Act.

(i) **EMERGENCY REGULATIONS.**—

(1) If the Secretary finds that the mortality or serious injury of marine mammals subject to a co-management plan is having, or is likely to have, an immediate and significant adverse impact on a stock or species, the Secretary may make an emergency depleted listing and remove this species or stock from management under a co-management plan.

(2) Emergency regulations prescribed under this subsection—

(A) shall be published in the Federal Register, together with an explanation thereof;

(B) shall remain in effect for not more than 180 days; and

(C) may be terminated by the Secretary at an earlier date by publication in the Federal Register of a notice of termination, if the Secretary determines that the reasons for emergency regulations no longer exist.

(3) If the Secretary finds that the species or stock continues to be subject to an immediate and significant adverse impact, the Secretary may extend the emergency regulations for an additional period of not more than 90 days or until reasons for the emergency no longer exist, whichever is

earlier.

(j) GRANTS.—Agreements entered into under this section may include grants to Alaska Native Tribes or Tribally Authorized Organizations for, among other purposes—

- (1) collecting and analyzing data on marine mammal populations;
- (2) monitoring the harvest of marine mammals for subsistence use;
- (3) participating in marine mammal research conducted by the Federal Government, State, academic institutions and private organizations; and
- (4) developing implementing and enforcing marine mammal co-management agreements and plans.”

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